

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

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CLERK U.S. DISTRICT COURT
W.D. OF TENNESSEE

MICHAEL D. KING, JR.,

Plaintiff,

vs.

No. 05-1304-T/An

LARRY SEAY, ET AL.,

Defendants.

ORDER ASSESSING \$250 FILING FEE
ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
NOTICE OF APPELLATE FILING FEE

Plaintiff Michael D. King, Jr., Tennessee Department of Correction ("TDOC") prisoner number 323626, an inmate at the Northwest Correctional Facility ("NWCX") in Tiptonville, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 on October 11, 2005. The Clerk shall record the defendants as Larry Seay, Michael Young, and "Ms. Sue," who is not otherwise identified.¹

¹ The complaint also purports to sue John Does 1, 2, and 3. However, service of process cannot be made on a fictitious party. Moreover, the filing of a complaint against "John Doe" defendants does not toll the running of the statute of limitation against those parties. See Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Bufalino v. Michigan Bell Telephone Co., 404 F.2d 1023, 1028 (6th Cir. 1968). Thus, to the extent plaintiff seeks to bring any complaint against any other individual or entity, he must identify the defendant and file a new lawsuit within the one-year statute of limitations applicable to § 1983 actions. Tenn. Code Ann. § 28-3-104(a).

I. Assessment of Filing Fee

Under the Prison Litigation Reform Act of 1995 (“PLRA”), 28 U.S.C. § 1915(a)-(b), all prisoners bringing a civil action must pay the full filing fee of \$250 required by 28 U.S.C. § 1914(a).² The statute merely provides the prisoner the opportunity to make a “downpayment” of a partial filing fee and pay the remainder in installments.

In this case, the plaintiff has properly completed and submitted an *in forma pauperis* affidavit containing a certification by the trust fund officer and a trust fund account statement. Pursuant to 28 U.S.C. § 1915(b)(1), it is ORDERED that the plaintiff cooperate fully with prison officials in carrying out this order. It is further ORDERED that the trust fund officer at plaintiff’s prison shall calculate a partial initial filing fee equal to twenty percent (20%) of the greater of the average balance in or deposits to the plaintiff’s trust fund account for the six months immediately preceding the completion of the affidavit. When the account contains any funds, the trust fund officer shall collect them and pay them directly to the Clerk of Court. If the funds in plaintiff’s account are insufficient to pay the full amount of the initial partial filing fee, the prison official is instructed to withdraw all of the funds in the plaintiff’s account, and forward them to the Clerk of Court. On each occasion that funds are subsequently credited to plaintiff’s account the prison official shall immediately withdraw those funds and forward them to the Clerk of Court, until the initial partial filing fee is paid in full.

² Effective March 7, 2005, the civil filing fee was increased from \$150 to \$250.

It is further ORDERED that after the initial partial filing fee is fully paid, the trust fund officer shall withdraw from the plaintiff's account and pay to the Clerk of this Court monthly payments equal to twenty percent (20%) of all deposits credited to plaintiff's account during the preceding month, but only when the amount in the account exceeds \$10, until the entire \$250 filing fee is paid.

Each time that the trust fund officer makes a payment to the Court as required by this order, he shall print a copy of the prisoner's account statement showing all activity in the account since the last payment under this order and file it with the Clerk along with the payment. All payments and account statements shall be sent to:

Clerk, United States District Court, Western District of Tennessee, 262 U.S.
Courthouse, 111 S. Highland Ave., Jackson, TN 38301

and shall clearly identify plaintiff's name and the case number on the first page of this order.

The obligation to pay this filing fee shall continue despite the immediate dismissal of this case. 28 U.S.C. § 1915(e)(2). If plaintiff is transferred to a different prison or released, he is ORDERED to notify the Court immediately of his change of address. If still confined he shall provide the officials at the new prison with a copy of this order. If the plaintiff fails to abide by these or any other requirement of this order, the Court may impose appropriate sanctions, including a monetary fine, without any additional notice or hearing by the Court.

The Clerk shall mail a copy of this order to the prison official in charge of prison trust fund accounts at plaintiff's prison. The Clerk is further ORDERED to forward a copy of

this order to the warden of the NWCX to ensure that the custodian of the plaintiff's inmate trust account complies with that portion of the PLRA pertaining to the payment of filing fees. However, the Clerk shall not issue process or serve any other papers in this case.

II. Analysis of Plaintiff's Claims

The complaint alleges that the plaintiff is a practicing Muslim and his religion requires him to abstain from consuming pork and pork by-products. According to the complaint, a cafeteria worker falsely represented to the plaintiff that a ham and cheese sandwich did not contain pork and that the "ham" was made from turkey. He later learned that the sandwich contained pork, and he also learned that several other menu items contained pork by-products, although inmates are apparently not informed of that fact. The plaintiff also alleges, without elaboration, that he is not being provided pork-free meals and, as a result, he is missing meals and losing weight.

Plaintiff seeks injunctive relief, including a temporary restraining order, and compensatory and punitive damages.

The Sixth Circuit has held that 42 U.S.C. § 1997e(a) requires a federal court to dismiss a complaint without prejudice whenever a prisoner brings a prison conditions claim without demonstrating that he has exhausted his administrative remedies. Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998); see Porter v. Nussle, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive

force or some other wrong.”); Booth v. Churner, 532 U.S. 731 (2001) (prisoner seeking only money damages must exhaust administrative remedies although damages are unavailable through grievance system). This requirement places an affirmative burden on prisoners of pleading particular facts demonstrating the complete exhaustion of claims. Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000). To comply with the mandates of 42 U.S.C. § 1997e(a):

a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Id. at 642; see also Boyd v. Corrections Corp. of Am., 380 F.3d 989, 985-96 (6th Cir. 2004) (describing the standard for demonstrating exhaustion when prison officials fail to respond in a timely manner to a grievance), *cert. denied*, 125 S. Ct. 1639 (2005); Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002) (prisoner who fails to allege exhaustion adequately may not amend his complaint to avoid a *sua sponte* dismissal); Curry v. Scott, 249 F.3d 493, 503-04 (6th Cir. 2001) (no abuse of discretion for district court to dismiss for failure to exhaust when plaintiffs did not submit documents showing complete exhaustion of their claims or otherwise demonstrate exhaustion). Furthermore, § 1997(e) requires the prisoner to exhaust his administrative remedies before filing suit and, therefore, he cannot exhaust those remedies during the pendency of the action. Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999). Finally, the Sixth Circuit recently held that district courts are required to dismiss a complaint in its entirety, pursuant to 42 U.S.C. § 1997e(a), that contains any unexhausted

claims. Jones Bey v. Johnson, 407 F.3d 801, 805-09 (6th Cir. 2005).

In this case, the plaintiff has submitted a copy of a grievance that he submitted on June 1, 2005 (Grievance No. 8651) in which he complained about the alleged misrepresentation concerning the ham and cheese sandwich. That grievance names defendants Seay, Young, and “Ms. Sue,” although it does not state what any of these individuals did or failed to do. The supervisor’s response, which is dated June 3, 2005, says:

The master menu does have the asterisk affixed beside the ham & cheese pocket. However, the menu provided with the grievance does not have the asterisk probably through making copies. Any reasonable person should expect ham as a pork product and select the alternative entree.

Also, there is no mention of who allegedly told I/M King the item did not contain port, if in fact anyone did. The[re] was no deliberate attempt to harm I/M King, nor to disrespect his religious beliefs.

There was a grievance committee hearing on June 28, 2005, at which time the chairman concurred with the supervisor’s response. Plaintiff appealed, and the warden agreed with the proposed response on June 28, 2005. Plaintiff appealed to the TDOC, which concurred with the warden on August 24, 2005. Accordingly, plaintiff has exhausted a claim against the named defendants based on the allegedly false representation that the ham and cheese sandwich did not contain pork.

The plaintiff has failed, however, to satisfy his burden of demonstrating that he has exhausted his broader claim that prison officials failed to provide pork-free meals. The Sixth Circuit recently stated that “[a] plaintiff who fails to allege exhaustion of administrative remedies through ‘particularized averments’ does not state a claim on which

relief may be granted, and his complaint must be dismissed *sua sponte*.” Baxter, 305 F.3d at 489. Moreover, pursuant to the recent decision in Jones Bey, a district court must dismiss any complaint that contains unexhausted claims rather than attempting to sever the exhausted claims. Accordingly, the Court DISMISSES the complaint in its entirety, without prejudice, pursuant to 42 U.S.C. § 1997e(a).³

III. Appeal Issues

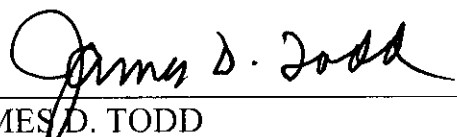
The next issue to be addressed is whether plaintiff should be allowed to appeal this decision *in forma pauperis*. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is frivolous. Id. Accordingly, it would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, yet has sufficient merit to support an appeal *in forma pauperis*. See Williams v. Kullman, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not taken in good faith.

³ As the Sixth Circuit explained, “If the plaintiff has exhausted his administrative remedies, he may always refile his complaint and plead exhaustion with sufficient detail to meet our heightened pleading requirement, assuming that the relevant statute of limitations has not run.” Baxter, 305 F.3d at 489.

The final matter to be addressed is the assessment of a filing fee if plaintiff appeals the dismissal of this case.⁴ In McGore v. Wrigglesworth, 114 F.3d 601, 610-11 (6th Cir. 1997), the Sixth Circuit set out specific procedures for implementing the PLRA. Therefore, the plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in McGore and § 1915(a)-(b).

IT IS SO ORDERED this 29th day of November, 2005.



JAMES D. TODD
UNITED STATES DISTRICT JUDGE

⁴ Effective November 1, 2003, the fee for docketing an appeal is \$250. See Judicial Conference Schedule of Fees, ¶ 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a \$5 fee.



Notice of Distribution

This notice confirms a copy of the document docketed as number 3 in case 1:05-CV-01304 was distributed by fax, mail, or direct printing on December 1, 2005 to the parties listed.

Michael D. King
Northwest Correctional Facility
323626
960 State Route 212
Tiptonville, TN 38079--403

Honorable James Todd
US DISTRICT COURT